Zahida bt Mohamed Rafik v Noor Azman bin Azemi

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-393–03 OF 2015
LIM YEE LAN, BADARIAH SAHAMID AND HASNAH HASHIM JJCA
16 MAY 2017

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Tort — Defamation — Defences — Appellant lodged police report that her personal driver absconded with huge amount of cash she asked him to bank into her account — Based on police report, newspaper published article of incident with additional comments by appellant — Driver sued appellant for defamation based on article — High Court awarded driver general damages, rejected appellant's defences of justification and ancillary privilege and dismissed her counterclaim — Whether impugned article was regurgitation of police report and enjoyed absolute privilege given to police report in ancillary manner — Whether defence of justification should have been upheld since appellant had proven that she had monies with her at material time — Whether appellant's counterclaim should have been allowed as she had proven truth of statements in her police report that her driver absconded with cash

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The respondent was the personal driver of the appellant, an actress. When he went to work as usual one morning, the respondent was asked by the appellant to count RM200,000 in cash, which she had just received from another party ('DW4') from a business deal, and then to bank in that cash and a cheque for RM120,000 into her account. Since the appellant had to visit her mother in hospital she was unable to go along with the respondent to the bank. In the afternoon of the same day, the appellant tried, in vain, to contact the respondent. She then called the bank to enquire if he had come to deposit the monies but was told no monies were banked into her account that day. The appellant then went to the respondent's house and found he had not come home. Later that evening, the appellant lodged a police report stating that the respondent had absconded with her money. When leaving the police station after making the report, media reporters approached the appellant and asked why she was there. The appellant explained the reason and read out the police report to them. A newspaper, *Harian Metro*, published an article three days later about the incident. Although the article did not name the respondent, it stated that the appellant's personal driver had gone missing with the RM200,000 and had not returned to his house; that the money was meant to be the appellant's payment to her business partner in China; that a police report had been made against the respondent and that police were investigating the case for criminal breach of trust. Based on that article, the respondent sued the appellant for defamation. The appellant relied on the defences of justification and ancillary privilege contending that the impugned article was a

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regurgitation of the police report which was protected by absolute privilege. The High Court rejected her defences, dismissed her counterclaim, found for the respondent and awarded him RM150,000 in general damages. Inter alia, the High Court held that the appellant had not adduced cogent evidence to prove that she had entrusted the RM200,000 to the respondent. The appellant filed the instant appeal against the decision.

Held, allowing the appeal, setting aside the decision of the High Court and allowing the appellant's counterclaim:

(1) The trial judge rightly held that the impugned words in the article in their natural and ordinary meaning were defamatory of the respondent. But she misdirected herself on the law in holding that the impugned words were not covered by ancillary privilege. The Federal Court in *Lee Yoke Yam v Chin Keat Seng* [2013] 1 MLJ 145 held that the defence of absolute privilege should be extended to statements made in a police report made under s 107 of the Criminal Procedure Code ('the CPC'), as in the case of a statement made under s 112 of the CPC, for reasons of public policy and that, consequently, no action for defamation could lie against the person who had lodged the police report. In the instant case, the evidence plainly showed that the impugned words were nothing more than a regurgitation of the words in the police report. The police report was republished in the impugned article. The publication of the impugned article in *Harian Metro* therefore enjoyed the protection of absolute privilege in an ancillary manner (see paras 25, 30 & 33).

(2) With regard to the defence of justification, the appellant had adduced evidence of her source of income and explained in cross-examination her source of payment. DW4 testified that he was the one who gave RM243,000 in cash to the appellant. The appellant's father, DW3, testified that he witnessed the appellant receiving and counting a large sum of money. The trial judge doubted the veracity of DW4's and DW3's evidence citing various discrepancies in their testimonies. But the burden was always on the respondent to prove his case. The trial judge should have asked herself whether it was plausible for a person in the appellant's position to have had the RM243,000 cash on the day in question. During cross-examination, the respondent readily admitted that the appellant definitely had more money than RM243,000. No evidence was adduced by the respondent to prove that the appellant's intention in filing the police report and making the accusations against him was because he knew of her alleged affair with a Minister. The trial judge failed to consider the veracity and credibility of the respondent as a witness, especially his conduct in failing to return to work and his disappearance immediately after the alleged incident. The appellant had succeeded in showing that there was an appealable error in the trial court's decision that justified appellate intervention (see paras 37–38).

(3) The appellant's counterclaim was allowed as she had established on balance of probabilities the truth of the statement in her police report that the respondent had run off with the monies she had entrusted to him to bank into her account (see para 39).

[Bahasa Malaysia summary

Responden adalah pemandu peribadi perayu, seorang pelakon. Pada satu pagi apabila dia pergi berkerja seperti biasa, responden diminta oleh perayu untuk mengira wang tunai sebanyak RM200,000, yang mana dia baru sahaja menerimanya daripada pihak lain ('DW4') daripada urusan perniagaan, dan kemudiannya untuk memasukkan wang tunai tersebut dan cek bagi sejumlah RM120,000 ke dalam akaunnya. Memandangkan perayu perlu melawat ibunya di hospital dia tidak dapat mengikuti responden ke bank. Pada tengahari hari yang sama, perayu mencuba untuk menghubungi responden tetapi dengan sia-sia. Dia kemudiannya menghubungi bank untuk bertanya jika responden telah datang untuk mendepositkan wang tersebut tetapi diberitahu tiada wang dimasukkan ke dalam akaunnya pada hari itu. Perayu kemudiannya pergi ke rumah responden dan mendapati dia tidak balik ke rumah. Kemudiannya pada malam tersebut, perayu membuat laporan polis menyatakan bahawa responden telah melarikan wangnya. Apabila meninggalkan stesyen polis selepas membuat laporan, wartawan media menghampiri perayu dan bertanya mengapa perayu berada di situ. Perayu menjelaskan sebab dan membaca laporan polis kepada mereka. Akhbar, *Harian Metro*, menerbitkan artikel tiga hari kemudian mengenai kejadian tersebut. Walaupun artikel tidak menamakan responden, ia menyatakan bahawa pemandu peribadi perayu telah hilang dengan wang RM200,000 adan tidak balik ke rumahnya; bahawa wang tersebut adalah bermaksud untuk perayu membayar kepada rakan perniagaannya di China; bahawa laporan polis telah dibuat terhadap responden dan bahawa polis sedang menyiasat kes tersebut bagi pecah amanah jenayah. Berdasarkan artikel tersebut, responden menyaman perayu untuk fitnah. Perayu bergantung ke atas pembelaan justifikasi dan keistimewaan sampingan berhujah bahawa artikel yang dipersoalkan tersebut adalah regurgitasi laporan polis yang dilindungi oleh keistimewaan mutlak. Mahkamah Tinggi menolak pembelaannya, menolak tuntutan balas perayu, memihak kepada responden dan mengawardkannya RM150,000 dalam ganti rugi am. Antara lain, Mahkamah Tinggi memutuskan bahawa perayu tidak mengemukakan keterangan jelas untuk membuktikan yang dia telah mengamanahkan wang RM200,000 kepada responden. Perayu memfailkan rayuan ini terhadap keputusan tersebut.

Diputuskan, membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi dan membenarkan tuntutan balas perayu:

(1) Hakim perbicaraan dengan betul memutuskan bahawa perkataan-perkataan yang dipersoalkan di dalam artikel dalam maksud

semula jadi dan biasa adalah fitnah terhadap responden. Tetapi dia salah arah dirinya atas undang-undang dalam memutuskan bahawa perkataan-perkataan yang dipersoalkan tidak dilindungi oleh keistimewaan sampingan. Mahkamah Persekutuan dalam kes *Lee Yoke Yam v Chin Keat Seng* [2013] 1 MLJ 145 memutuskan bahawa pembelaan keistimewaan mutlak patut dilanjutkan kepada pernyataan yang dibuat di dalam laporan polis yang dibuat di bawah s 107 Kanun Tatacara Jenayah ('KTJ'), kerana dalam kes di mana pernyataan di buat di bawah s 112 KTJ, bagi alasan polisi awam dan bahwa, akibatnya, tiada tindakan untuk fitnah boleh dibuat terhadap orang yang telah membuat laporan polis. Dalam kes ini, keterangan dengan jelas menunjukkan bahawa perkataan-perkataan yang dipersoalkan tersebut tidak lebih daripada regurgitasi perkataan-perkataan di dalam laporan polis. Laporan polis diterbitkan semula di dalam artikel yang dipersoalkan tersebut. Penerbitan artikel yang dipersoalkan di dalam *Harian Metro* oleh itu menikmati perlindungan keistimewaan mutlak di dalam cara sampingan (lihat perenggan 25, 30 & 33).

(2) Berkaitan pembelaan justifikasi, perayu telah mengemukakan keterangan mengenai sumber pendapatannya dan menjelaskan dalam pemeriksaan balas sumber bayarannya. DW4 memberi keterangan bahawa dia lah orang yang memberi wang RM243,000 dalam tunai kepada perayu. Bapa perayu, DW3, memberi keterangan bahawa dia menyaksikan perayu menerima dan mengira sejumlah besar wang. Hakim perbicaraan meragui kebenaran keterangan DW4 dan DW3 dengan pelbagai percanggahan dalam keterangan mereka. Tetapi beban adalah sentiasa di atas responden untuk membuktikan kesnya. Hakim perbicaraan patut menyoal dirinya sama ada ia adalah munasabah untuk seorang dalam kedudukan perayu mempunyai wang sebanyak RM243,000 dalam tunai pada hari yang dipersoalkan. Semasa pemeriksaan balas, responden tanpa teragak-agak mengakui bahawa perayu sememangnya mempunyai wang lebih daripada RM243,000. Tiada keterangan dikemukakan oleh responden untuk membuktikan bahawa niat perayu dalam memfailkan laporan polis dan membuat tuduhan terhadapnya adalah kerana dia mengetahui mengenai hubungannya dengan Menteri. Hakim perbicaraan gagal untuk mempertimbangkan kebenaran dan kredibiliti responden sebagai saksi, terutamanya kelakuannya yang gagal untuk kembali bekerja dan kehilangannya sejurus selepas kejadian tersebut. Perayu telah berjaya dalam menunjukkan bahawa terdapat kesilapan rayuan di dalam keputusan mahkamah perbicaraan yang menjustifikasikan campur tangan Mahkamah Rayuan (lihat perenggan 37–38).

(3) Tuntutan balas perayu dibenarkan kerana dia telah membuktikan atas imbangan kebarangkalian kebenaran pernyataan di dalam laporan polisnya bahawa responden telah melarikan diri dengan wang yang

diamanahkan oleh perayu kepadanya untuk dimasukkan ke dalam akaunnya (lihat perenggan 39).]

Notes

For cases on defences, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 474–518.

Cases referred to

Abdul Manaf bin Ahmad v Mohd Kamil Datuk Haji Mohd Kassim [2011] 4 MLJ 346, CA (refd)
Ayob bin Saud v TS Sambanthamurthi [1989] 1 MLJ 315; [1989] 1 CLJ Rep 321, HC (refd)
Jeyaretnam Joshua Benjamin v Lee Kuan Yew [1992] 2 SLR 310, CA (refd)
Lee Yoke Yam v Chin Keat Seng [2013] 1 MLJ 145, FC (refd)
S Ashok Kandiah & Anor v Dato' Yalumallai @ Ramalingam s/o Muthusamy & Anor [2010] MLJU 2218; [2011] 1 CLJ 460, CA (refd)
Sharifuddin Mohamed & Anor v Dato' Annas bin Khatib Jaafar [2016] MLJU 1729; [2016] 3 CLJ 574, CA (refd)
Sutherland and Others v Stopes [1925] AC 47, HL (refd)
Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor [1973] 2 MLJ 56 (refd)
Tan Sri Dato' Seri Musa bin Dato' Hj Hassan v Dato' Seri Anwar Ibrahim [2010] MLJU 934; [2010] 8 CLJ 239, HC (refd)
Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors [1996] 1 MLJ 393; [1995] 1 LNS 304, HC (refd)

Legislation referred to

Criminal Procedure Code ss 107, 112

Appeal from: Suit No 23NCVC-95–11 of 2013 (High Court, Kuala Lumpur)

Muhammad Shafee Abdullah (Wan Aizuddin Wan Mohammed with him) (Shafee & Co) for the appellant.
Latheefa Koya (Shahid Adli Kamarudin with her) (Daim & Gamany) for the respondent.

Hasnah Hashim JCA:

[1] The appeal before us was against the decision of the learned High Court Judge in Kuala Lumpur High Court Civil Suit No S-23(NCVC)-95–11 of 2013 which on 26 March 2015 allowed the respondent's claim for defamation arising from an article published in *Harian Metro* on 3 March 2012 entitled 'Zahida Rafik Terkedu' and awarded general damages in the sum of RM150,000 with costs of RM40,000.The High Court judge dismissed the defendant's counterclaim. For ease of reference, in this judgment, parties will

A be referred to as they were in the High Court.

[2] After having heard and considered the submissions of the respective counsels we allowed the appeal and set aside the award for damages. We now give our reasons for doing so.

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MATERIAL FACTS

[3] The defendant is an actress and the plaintiff was her personal driver. On 29 February 2012 the plaintiff went to work as usual at the defendant's house. He was asked by the defendant to count monies which she had just received. The defendant then handed RM200,000 in cash and a cheque for the amount of RM120,000 to the plaintiff to be banked in. Since the defendant's mother was hospitalised at that material time the defendant was unable to go to the bank. At about 2pm on the same day the defendant went to the Ampang Puteri Hospital to visit her mother. She tried to contact the plaintiff but was unsuccessful. At about 3.45pm she contacted Maybank Jalan Ampang Branch to enquire whether the monies she had handed over to the plaintiff had been bank in as instructed. The bank officer informed the defendant that there was no transaction made in respect to her bank account that day.

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[4] The defendant together with her sister and brother-in-law went to the plaintiff's house to look for the plaintiff. They were told by the plaintiff's mother that he was not at home. At about 6.30pm the same day the defendant lodged a police report against the plaintiff at the Ampang Jaya police headquarters. In the police report she stated as follows:

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> PADA 29/02/2012 JAM L/KURANG 1130HRS SAYA SEPERTI NAMA DAN ALAMAT DI ATAS NOORAZMAN BIN AZMI NO KP (7401214-14-6237) NO TEL (0193731974) PEMANDU PERIBADI SAYA TELAH MELARIKAN WANG TUNAI SEBANYAK RM200,000.00. SAYA TELAH MENYERAHKAN WANG TERSEBUT KEPADANYA UNTUK BANK INI DALAM AKAUN SAYA.

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[5] After making the police report the defendant was approached by reporters who were waiting for her outside the police station. The reporters had enquired the reason she went to the police station. She told them she had lodged a police report against the plaintiff and read the report to them. On 3 March 2012 *Harian Metro* published the article entitled 'Zahida Rafik Terkedu' which is the subject matter of the defamation suit.

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The alleged defamatory statements

[6] We set out the alleged defamatory statements as published by the *Harian Metro*:

AMPANG: Pelakon Zahida Mohamed Rafik, 37, kerugian RM200,000 dilarikan pemandu peribadinya selepas diarah memasukkan wang berkenaan ke dalam akaun banknya.

Zahida yang popular menerusi filem komedi 'Anak Mami The Movie' menyerahkan wang tunai berkenaan kepada lelaki berusia 37 tahun itu pada kira-kira jam 11 pagi Rabu dan sejak itu suspek gagal dihubungi serta dipercayai sudah melarikan diri.

Pelakon kacukan Melayu-Pakistan itu yang menjalankan perniagaan milik keluarganya di sini turut ke rumah suspek untuk mencarinya, tetapi tidak berhasil apabila dimaklumkan lelaki berkenaan tidak pulang ke rumah dan gagal dihubungi.

Zahida kemudian membuat laporan di Ibu Pejabat Polis Daerah (IPD) Ampang Jaya, di sini, pada petang hari sama.

Ketua Polis Daerah Ampang Jaya, Asisten Komisioner Amiruddin Jamaluddin mengesahkan menerima laporan berkenaan dan kes itu disiasat mengikut Seksyen 406 Kanun Keseksaan kerana pecah amanah.

Sementara itu, Zahida ketika dihubungi semalam berkata, apa yang berlaku mungkin kesilapannya sendiri kerana terlalu percaya terhadap pemandunya itu.

'Saya percayakan sebab dia sudah bekerja dengan saya hampir lima tahun dan sebelum ini tidak pernah melakukan apa-apa kesalahan,' katanya.

Zahida berkata wang RM200,000 itu sepatutnya digunakan untuk membuat pembayaran kepada rakan perniagaannya di China.

'Sebelum ini sudah banyak kali dia (suspek) membantu saya dalam urusan memasukkan duit ke dalam akaun bagi urusan kerja, tapi tidaklah jumlah yang besar sebegini. Kebiasaannya saya akan turut sama pergi dan dia hanya menemani. Namun, kali ini saya benar-benar tidak sempat kerana ibu sakit dan saya agak kelam-kabut di rumah bagi menguruskan beberapa perkara,' katanya. Menurut Zahida, dia langsung tidak mengjangka pemandunya sanggup menghilangkan diri bersama wang RM200,000 itu.

Sebelum membuat laporan polis, saya ke rumahnya. Maklumlah sudah hampir lima tahun dia bekerja dengan saya, saya kenal anak-anak dan ibunya yang tinggal bersama. Mungkin juga dia ada masalah kewangan atau memerlukan duit, jadi saya ke rumahnya untuk bertanya dan berbincang. Namun ibunya hanya memberitahu dia sudah beberapa hari tidak pulang ke rumah. Jadi, saya tiada pilihan selain melaporkan kepada polis, katanya.

[7] The impugned words in the article that the plaintiff complained are defamatory of him are as follows:

(a) 'Pelakon Zahida Mohamed Rafik, 37, kerugian RM200,000 dilarikan pemandu peribadinya selepas diarah memasukkan wang ...';

(b) '... lelaki berusia 37 tahun itu pada kira-kira jam 11 pagi Rabu dan sejak itu suspek gagal dihubungi serta dipercayai sudah melarikan diri';

(c) '… menerima laporan berkenaan dan kes itu disiasat mengikut Seksyen 406 Kanun Keseksaan kerana pecah amanah';

(d) 'Sementara itu, Zahida ketika dihubungi semalam berkata, apa yang berlaku mungkin kesilapannya sendiri kerana terlalu percaya terhadap pemandunya itu';

(e) '*Saya percayakan sebab dia sudah bekerja dengan saya hampir lima tahun dan sebelum ini tidak pernah melakukan apa-apa kesalahan*, katanya'; and

(f) 'Zahida berkata wang RM200,000 itu sepatutnya digunakan untuk membuat pembayaran kepada rakan perniagaannya di China'.

[8] It is the plaintiff's pleaded case that the words used in their natural and ordinary meaning were defamatory and were meant to mean, amongst others, that the plaintiff:

(a) is dishonest;

(b) a thief;

(c) untrustworthy;

(d) a criminal;

(e) a person who does not have a good reputation; and

(f) a person with no morals.

[9] The plaintiff contended that the impugned words in the article are false, unfounded and maliciously published. The impugned words had tainted his reputation, character as well as affected his opportunity to get a new job.

[10] The defendant raised the defence of justification and ancillary privilege. It is the defendant's pleaded case that she had received cash of RM243,000 on 28 February 2012 from Shaheful Ardan Adenan (DW4) as commission due to her in respect of a business transaction between them.

[11] The defendant pleaded that the impugned words enjoyed ancillary privilege as it was a regurgitation of the police report which is protected by absolute privilege.

THE HIGH COURT DECISION

[12] The learned High Court judge was of the considered view that the plaintiff had proven that the impugned words in the article was defamatory and not protected by ancillary privilege. Her Ladyship found that there was no cogent evidence of the material fact that the defendant had entrusted the plaintiff with RM200,000 cash on 29 December 2012 to be banked in. The

defendant failed to prove the defence of justification and absolute privilege. A

[13] The learned High Court judge allowed the plaintiff's claim on 26 March 2015 and ordered the defendant to pay RM150,000 as general damages and costs. B

The appeal

[14] The appeal was grounded upon the following grounds:

(a) that the impugned words complained of are not defamatory; C

(b) that the contents of the police report made by the defendant is protected under absolute privilege. The publication of the impugned words was a regurgitation of the police report made by the defendant;

(c) there is cogent and credible evidence that the defendant had entrusted the plaintiff with the RM200,000 in cash to be banked in; D

(d) there is cogent and credible evidence that the defendant had entrusted the plaintiff with the RM200,000 in cash to be banked in; and

(e) the plaintiff was not entitled to an award of RM15,000 as costs. E

The submission of the defendant

[15] Before us learned counsel for the defendant submitted that based on the evidence adduced the defendant succeeded to prove the defence of justification. The existence of the monies was proven by the defendant. The source of where the monies form is immaterial. The plaintiff had admitted that the defendant is a person of means and capable of having such an amount of money. F

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[16] It is further submitted that the defendant's actions from the inception of her complaint against the plaintiff absconding with the monies was consistent and corroborated by all the witnesses called for the defence.

[17] Learned counsel argued that the defence of absolute privilege in an ancillary manner is available to the defendant as the article had published the police report that she had lodged. H

The submission of the plaintiff I

[18] It is the submission of learned counsel for the plaintiff that the impugned words in their natural and ordinary meaning were defamatory and understood to mean that the plaintiff was amongst others, a thief and dishonest. Ancillary privilege would only cover publication incidental to the

A ordinary course of business. There was no cogent evidence adduced by the defendant to show that it was necessary for her regurgitate the contents of the police report. The defendant had failed to prove the defence of ancillary privilege.

B **[19]** Learned counsel for the plaintiff further submitted that there were various contradictions in the defendant's testimony because there was never RM243,000 in cash given to her. The defendant failed to prove the defence of justification.

C **[20]** The damages awarded was fair and should not be disturb as the allegation by the defendant had the effect of portraying the plaintiff as thief and untrustworthy.

D DECISION

[21] It is trite that to establish the tort of defamation the burden is on the plaintiff to prove that the impugned words:

E (a) were capable of bearing the defamatory meaning put forward;

(b) referred to the plaintiff; and

(c) published by the defendant to a third person.

F (Re: *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315 at p 316; [1989] 1 CLJ Rep 321 p 324.)

Whether the statements were defamatory

G **[22]** The learned trial judge had found that the words complained of in the impugned article are defamatory as they gave rise to importations that the plaintiff had absconded with the monies entrusted to him by the defendant. Mohamed Azmi J (as he then was) in *Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 2 MLJ 56 at p 58 said:

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> ... the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, although no one believes the statement to be true. Another test is: would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally? The typical type of defamation is an attack upon the moral character of the plaintiff attributing crime, dishonesty, untruthfulness, ingratitude or cruelty.

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[23] Justice Richard Malanjum H (as he was then) in *Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393; [1995] 1 LNS 304 said that the correct approach in the construction of the words

complained of:

> ... is to consider the meaning such words would convey to ordinary reasonable persons using their general knowledge and common sense; it is not confined to strict literal meaning of the words but extends to any reference or implication from which persons can reasonably draw.

[24] In *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 2 SLR 310, LP Thean J, succinctly explained what is natural and ordinary meaning of the word at pp 318–319:

> In determining the natural and ordinary meaning of the words complained of, the sense or meaning intended by the appellant is irrelevant. Nor for such purpose is the sense or meaning in which the words were understood by the respondent relevant. Nor is extrinsic evidence admissible in construing the words. The meaning must be gathered from the words themselves and in the context of the entire speech made by the appellant on that occasion. It is the natural and ordinary meaning as understood by reasonable members of the audience at the Bedok car park on that evening using their general knowledge and common sense. Such meaning is not confined to a literal or strict meaning of the words, but includes any inferences or implications which could reasonably be drawn by such persons: see para 4.04 of *Duncan and Neill on Defamation* (2nd Ed) ...

[25] The meaning must be gathered from the actual words used in the context of the article. Having examined the words used in the article we are of the considered view that the learned judge was correct to have concluded that the words in its natural and ordinary meaning were defamatory and disparaged the plaintiff.

[26] It is an undisputed fact that the impugned words referred to the plaintiff and that the article was published by *Harian Metro.*

The defence of absolute privilege

[27] The learned High Court judge erred in holding that the defence of absolute privilege raised by the defendant was devoid of merit bearing in mind that the impugned words in the article was based on the police report made by the defendant. Learned counsel for the defendant submitted that the contents of the police report made by the defendant is protected under absolute privilege.

[28] The doctrine of absolute privilege protects statements made in the course of legal proceedings. No action in defamation could thus be brought against a witness, the parties. Abdul Malik Ishak JCA in the case of *S Ashok Kandiah & Anor v Dato' Yalumallai @ Ramalingam s/o Muthusamy & Anor* [2010] MLJU 2218; [2011] 1 CLJ 460 observed:

In short, absolute privilege attaches to statements made in the course of judicial proceedings. Indeed, *Gatley on Libel and Slander* (11th Ed) at p 382 wrote that:

> No action will lie for defamatory statements, whether oral or written, made in the course of judicial proceedings before a court of justice or a tribunal exercising functions equivalent to those of an established court of justice.

[10] The learned author continued to write at p 385 in this way:

> The privilege will attach to any matter incidental to the proceedings 'practically necessary for the administration of justice.' That it is convenient is insufficient. However, with the exception of proofs of evidence of witnesses or inquiries in criminal cases, it is not enough that proceedings are contemplated: they must be actually on foot or the matter in issue must be an act which initiates them. In the case of proceedings of regular courts this is not likely to cause any difficulty since the initiation of the proceedings will involve a well-recognised formal step such as the issue of a claim form, but the matter may be more difficult in the case of other tribunals exercising functions of a judicial nature.

[11] It is now settled law that statements made in the course of judicial proceedings or statements contained in documents made in judicial proceedings are absolutely privileged (*Coopers & Lybrand v Singapore Society of Accountants & Ors* [1988] 3 MLJ 134; [1988] 1 LNS 60 at pp 136–137).

[29] In rejecting the defendant's defence of absolute the learned High Court judge had relied on her grounds of judgement in the striking out application that was before her. Her Ladyship concluded that the defendant '... As an actress of no small frame ...' knew that the reporters would publish her statements and there was therefore implied consent to publish the answers to the questions posed by the reporters. The learned High Court judge found that the defendant failed to give any reasonable excuse that necessitated the regurgitation of the police report and that '... pandering to the press ...' is not an acceptable reasonable excuse. Her Ladyship concluded that the impugned words are not covered by ancillary privilege.

[30] In our opinion the learned judge had misdirected herself on the law when she concluded that the impugned words in the article are not covered by ancillary privilege. The Federal Court in *Lee Yoke Yam v Chin Keat Seng* [2013] 1 MLJ 145 held that the defence of absolute privilege should be extended to statements made in a police report under s 107 of the Criminal Procedure Code ('the CPC') for reasons of public policy was correct and consequently no action for defamation should lie against the person who lodged the police report. The Federal Court agreed with the decision in *Abdul Manaf bin Ahmad v Mohd Kamil Datuk Haji Mohd Kassim* [2011] 4 MLJ 346 that on public policy consideration, absolute privilege should be extended to statements contained in a police report lodged under s 107 of the CPC as in the case of a statement made under s 112 of the CPC:

> ... we agree with the decision of the Court of Appeal in *Abdul Manaf Ahmad* that on public policy consideration, absolute privilege should be extended to a statement contained in a police report lodged under s 107 of the CPC as in the case of statement made under s 112 of the CPC. The underlying reason behind this, is the overriding public interest that a member of the public should be encouraged to make police report with regard to any crime that comes to his or her notice. Such a report is important to set the criminal investigation in motion. With such report, the alleged crime may be investigated and the perpetrator be brought to justice. It is without doubt that public interest should override the countervailing consideration that this may sometime lead to an abuse by a malicious informant. In any event, if a false report is lodged by a complainant, he is liable to be prosecuted for making false report under s 177, s 182 or s 203 of the Penal Code. That we believe provides a sufficient safeguard against any person from making a false report.

[31] Justice Prasad Abraham HCJ (as he then was) in the case of *Tan Sri Dato' Seri Musa bin Dato' Hj Hassan v Dato' Seri Anwar Ibrahim* [2010] MLJU 934; [2010] 8 CLJ 239 explained the application of ancillary privilege,

> Ancillary privilege arises where if it is established at the impugned news conference the defendant regurgitates the contents of the police report. The privilege is ancillary to the privilege accorded to the police report although when at the news conference the press is not privy to the making of the police report itself. For ancillary privilege to apply, is it reasonable the defendant in the position that he was would be subject to scrutiny to by the media and thus repeating the contents of the police report, would possibly allow the plea of ancillary privilege to arise in a situation where for instance public interest justifies the publication of the police report.

[32] The Court of Appeal in *Sharifuddin Mohamed & Anor v Dato' Annas bin Khatib Jaafar* [2016] MLJU 1729; [2016] 3 CLJ 574 was of the view that the ACA report, being an absolutely privileged document, the republication of it in the form of the impugned article also enjoy the protection of ancillary absolute privilege in an ancillary manner.

[33] In this appeal, the evidence adduced plainly shows that the impugned words in the article were in fact nothing more than a regurgitation of the words in the police report. The police report was republished in the impugned article. We agree with the defendant that the learned trial judge had erred when she concluded that that the defence of absolute privilege is not available to the defendant. The publication of the alleged defamatory contents of the publication in the *Harian Metro* attracts the same privilege in an ancillary manner as that attaching to the police report. We are, therefore of the considered view that the publication of the impugned article in *Harian Metro* would enjoy the protection of absolute privilege in an ancillary manner.

The defence of justification

[34] The defendant's pleaded defence is that she had received cash of RM243,000 on 28 December 2012 from DW4. In a defamation action, the defence of justification is a complete defence if it succeeds. To succeed in the defence of justification the defendant must establish the truth of all the material statements in the words complained. To justify such comments, it was necessary to show that the statements were the correct imputations or conclusions to be drawn from the proved facts. However, the plea of justification does not fail if the truth of every charge was not proven to be true do not materially injure the plaintiff's reputation.

[35] Lord Finlay in *Sutherland and Others v Stopes* [1925] AC 47 (HL) at pp 62–63 correctly described the defence of justification:

> Such a plea of justification means that the libel is true not only in its allegations of fact but also in any comments made therein ... the defendant has to prove not only that the facts are truly stated but also that any comments upon them are correct.

[36] We have perused the article containing the impugned words in detailed and it is our considered view, on plain reading of the words used in the said article the defendant was regurgitating the police report which she had made.

[37] The defendant had adduced evidence of her source of income and explained in cross-examination her source of payment. The person who made the payment to the defendant was called as witness. DW4 testified in court that he had issued the voucher (exh D2) to the defendant for the payment of 'bayaran ihsan daripada saya atas semua urusan pernaigaan'. DW4 confirmed in his evidence that he had made the cash payment of RM243,000 to the defendant. The defendant's father ('DW3') gave evidence that he witnessed the defendant receiving and counting the large sum of money on 28 December 2012. Her Ladyship doubted the veracity of DW4 and DW3's evidence citing various discrepancies in their testimony. However, Her Ladyship had forgotten that the burden is always on the plaintiff to prove his case. The learned judge should have asked whether it is plausible for a person in the defendant's position to have cash of RM243,000 on the day in question. During cross-examination, the plaintiff, himself readily admitted that the defendant definitely had more money than RM243,000. No evidence was adduced by the plaintiff to prove that the intention of the defendant filing the police report and making the accusations against him was because he knew of her alleged affair with a Minister. Her Ladyship also failed to consider the veracity and credibility of the plaintiff as a witness, especially his conduct after he failed to return to work and his disappearance immediately after the alleged incident.

CONCLUSION

[38] Having considered the decision of the learned High Court in its entirety in light of the materials placed before us and the able submissions by both learned counsels, oral as well as written, we are of the respectful view that there is an appealable error that had been shown by the appellant that could properly justify an appellate intervention.

[39] Based on the foregoing reasons, we allowed the appeal with costs of RM50,000 here and below subject to the payment of allocator fee. We set aside all of the orders of the learned trial judge. We also allowed the counterclaim as the defendant has established on the balance of probabilities that the truth of the statement in her police report that the plaintiff had run off the sum of RM243,000 which she entrusted him to bank into her account. The decision of the High Court is set aside. The deposit refunded.

Appeal allowed; decision of High Court set aside and appellant's counterclaim allowed.

Reported by Ashok Kumar